PP

v.

JAMIL JILAP & ORS

HIGH COURT SABAH & SARAWAK, SANDAKAN
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: S41-02 OF 1999]
12 OCTOBER 1999

CRIMINAL PROCEDURE: *Prosecution - Prosecution by Director of Forest Department - Forest Enactment 1968, s. 40A - Whether s. 40A contravened art. 145(3) Federal Constitution - Whether prosecution a nullity*

The respondents were charged under s. 30(1)(g) of the Forest Enactment 1968 ('the Enactment'). In the magistrate's court, the respondents objected to the continuation of the proceedings on the ground that the proceedings pursuant to s. 40A of the Enactment contravened art. 145(3) of the Federal Constitution ('Constitution'). The magistrate allowed the objection and discharged the respondents not amounting to an acquittal. Hence, the instant appeal by the public prosecutor.

It was contended on behalf of the public prosecutor that: (i) s. 40A of the Enactment should not be given a narrow interpretation but to be understood as inclusive of the power to institute the instant proceedings by virtue of the power bestowed upon the prosecuting officer thereof; (ii) one Mr Lester Daungkil, an administrative officer with the Forestry Department, was authorised by the deputy public prosecutor pursuant to ss. 376(iii) and 377(b) of the Criminal Procedure Code to conduct prosecutions in the Sessions Courts and Magistrate Courts in Sabah; and (iii) that the prosecution was proper as the public prosecutor could intervene at any time in the course of the proceedings.

Held:

[1] Any provision which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence must necessarily fall foul of art. 145(3) of the Constitution [*Public Prosecutor v. Lee Ming and Anor*]. Section 40A of the Enactment gives authority to the director of the forestry department, *inter alia*, to institute criminal proceedings and that runs contrary to art. 145(3) of the Constitution. Thus, s. 40A is unconstitutional.

[2] Although forestry matter is within the State List in the Ninth Schedule of the Constitution, it should not read as overriding the effect of art. 145 of the Constitution.

[3] When the trial began it was one Mr Raisun Abas who prosecuted and not Mr Lester Daungkil. There was no indication on the source of authority of Mr Raisun when he instituted the criminal proceedings. It can only be concluded that it must be pursuant to s. 40A of the Enactment. That would make the institution of the proceeding a nullity in view of the finding that s. 40A was unconstitutional.

[4] There should be no room for assumption when it comes to interpretation of any provision of the constitution. The power of the public prosecutor to intervene is not questioned but rather the intended purpose of the impugned section in relation to art. 145 of the Constitution, *ie*, a purported move to empower another with authority to institute and conduct criminal prosecution in the face of the clear wordings of art. 145(3).

[Appeal dismissed; a fresh charge could be commenced without relying on s. 40A of Enactment.]

Case(s) referred to:
Krishnan v. PP [1987] 1 MLJ 292 ***(refd)***
Long Samat & Ors v. PP [1974] 2 MLJ 152 ***(refd)***
PP v. Lee Ming & Anor [1999] 1 CLJ 379 ***(foll)***
Repco Holdings Bhd v. PP [1997] 4 CLJ 740 ***(foll)***
Sjn Thomas Manivello v. Lt Kol Din Yati Dahlan & Ors [1998] 3 CLJ 761 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 376(iii), 377(b), 380(ii)(b)
Federal Constitution, art. 145(3)
Sabah Forests Enactment 1968, s. 40A
Sarawak Forest Ordinance 1958, s. 92A

For the appellant - Nur Aini Zulkifli, SFC/DPP
For the respondents - Rahim Abdullah; M/s Rahim Abdullah & Co

Reported by Usha Thiagarajah

JUDGMENT

Richard Malanjum J:

Introduction

On 7 October 1999 I dismissed the appeal by the public prosecutor against the decision of the learned magistrate allowing the preliminary objection

of the learned counsel for the respondents. The objection was on the unconstitutionality of s. 40A of the Sabah Forests Enactment 1968 (the Enactment) thereby rendering the institution of the criminal prosecution against the respondents a nullity. In dismissing the appeal I indicated that I would give the reasons later. I do so now.

The Charge

The charge preferred against the respondents reads as follows:

> Bahawa kamu pada 13/03/97 lebih kurang jam 4:15 petang dengan niat dan tanpa sebarang hak sama ada dari sisi undang-undang ataupun kuasa yang sah didapati ada di dalam kawalan kamu sebanyak 524 batang balak yang mana cukai royalti berjumlah RM27,098.10 belum dibayar kepada Jabatan Perhutanan dan balak-balak tersebut sedang ditarik dengan menggunakan sebuah bot bernombor pendaftaran SN 197/4 di kawasan Laut Terusan Duyong di dalam Daerah Sandakan dan yang demikian telah melakukan kesalahan di bawah seksyen 30(1)(g) Enakmen Hutan 1968 dan boleh dihukum di bawah seksyen 30(2)(b) Enakmen Hutan yang sama.

At the outset of the hearing proper learned counsel for the respondents objected to the continuation of the proceeding on the ground that the prosecution was a nullity as it was proceeded pursuant to s. 40A of the Enactment. And it was his contention that that section should be ruled as unconstitutional being in contravention of art. 145(3) of the Federal Constitution. Such argument found favour with the learned magistrate relying on the decision in the case of *PP v. Lee Ming & Anor* [1999] 1 CLJ 379[[1998] 4 MLJ 113 and *Repco Holdings Bhd v. PP* [1997] 4 CLJ 740; [1997] 3 MLJ 681.

The Appeal And Contentions

Briefly it was the contention of the learned deputy prosecutor that s. 40A of the Enactment should not be given a narrow interpretation but to be understood as inclusive of the power to institute the instant proceeding by virtue of the power bestowed upon the prosecuting officer thereof. It is to be noted that on 1 April 1998 the deputy public prosecutor issued a written authority pursuant to ss. 376(iii) and 377(b) of the Criminal Procedure Code F.M.S Cap. 6 to one Mr. Lester Daungkil, an administrative officer with the Forestry Department Sabah, to conduct prosecutions in the sessions courts and magistrate courts in Sabah. It was also argued that a wide interpretation to the said section should be allowed since there was nothing

to prevent the public prosecutor from intervening in the course of any prosecution under the said Enactment.

For the respondents the argument as submitted in the lower court was repeated.

Finding

For convenience it is appropriate here that I should reproduce the impugned section and art. 145(3) of the Federal Constitution.

Section 40A reads:

> 40A. Power to prosecute and to institute legal action etc.
>
> (1) The Director may prosecute any offence or institute any action, suit or other proceedings relating to any matter under this Enactment.
>
> (2) In any prosecution, action, suit or other proceedings to which this section applies, the Director may appear personally or may be represented by the State Attorney-General, any legal officer of the State Attorney-General's Chambers or of the Forestry Department, or any authorised officer.
>
> En 8/98 w.e.f. 31.12.98

And art. 145(3) of the Federal Constitution (the Constitution) states:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

In *Lee Ming*'s case *(supra)* a similar situation also arose in that there the issue was on the constitutionality of a provision in the Sarawak Forest Ordinance 1958 s. 92A. That section reads:

> 92A. Prosecution in respect of offences under this Ordinance or any subsidiary legislation made hereunder may be conducted by the Director or any forest officer or servant of the Government specially authorized in writing in that behalf of the Director.

In declaring that provision unconstitutional the learned judge had this to say, at p. 117:

> That provision is surely, in the light of *Repco Holdings Bhd v. PP* [1997] 3 MLJ 681, which I respectfully follow, unconstitutional, null and void as it allows persons other than the Federal Attorney General to institute, conduct or discontinue any proceedings for an offence. Therefore, whatever the nature of the authorization that was given pursuant to that provision did not clothe the prosecution officer with authority to prosecute. In this regard, the learned sessions court judge was right in concluding that the prosecution was a nullity.

And in reference to s. 380(ii)(b) of the Criminal Procedure Code (the Code) as a possible basis to say otherwise the learned judge in the same case at p. 120 said this:

> Whatever it is, art. 145(3) of the Constitution again comes into play. Any provision which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence must necessarily fall foul of art. 145(3). In this regard, s. 380(ii)(b) which the prosecution relies on as allowing the prosecution officer to prosecute must be examined to see whether it falls foul of art. 145(3). It is clear from the wording of s. 380(ii)(b), which I have earlier reproduced, that the conduct of prosecution was taken totally out of the hands of the Federal Attorney General and vested in officers of Government department, local authority or statutory authority and there is not even a need to obtain sanction to prosecute from the Attorney General. It must follow from the decision of *Repco Holdings Bhd v. PP* that s. 380(ii)(b) is also unconstitutional and a nullity. Not only that, every legislation, be it State or Federal, which attempts to clothe any person other than the Federal Attorney General with the power to institute, conduct or discontinue any prosecution for an offence would also be unconstitutional and a nullity.

Now, in the instant case it is obvious that the impugned section of the Enactment gives authority to the director of the forestry department, *inter alia*, to institute criminal proceeding. That to my mind runs contrary to the clear provision of art. 145(3) of the Constitution. As such as in *Lee Ming*'s case *(supra)* I would therefore rule that s. 40A of the Enactment is unconstitutional.

No doubt forestry matter is within the state list as enshrined in the ninth schedule of the Constitution. But that should not be read as overriding the effect of art. 145(3) thereof. Indeed in the case of *Long Samat & Ors v. PP* [1974] 2 MLJ 152 at p. 158, his Lordship Suffian LP clearly made this observation thus:

On independence the Federal Constitution came into force, and cl. (3) of its Article 145 (as amended) provides:

> The Attorney General shall have power exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.

In our view, this clause from the supreme law clearly gives the Attorney General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd v. Breed* [1974] 2 All ER 21). Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

Anyone who is dissatisfied with the Attorney General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts.

Accordingly I find no basis to rely on any possible help that may appear to come by under the state list of the ninth schedule of the Constitution.

As regards the authorization given to Mr. Lester Daungkil I would say that it did not assist the position of the prosecution. In the first place the institution of the criminal charge against the respondents took place on 5 February 1998 while the authority was only given on 1 April 1998. It should be understood that it was on 5 February 1998 that the criminal proceeding was instituted. In the case of *Sjn Thomas Manivello v. Lt Kol Din Yati Dahlan & Ors* [1998] 3 CLJ 761 this is what his Lordship Shaik Daud JCA at p. 766 said:

> Therefore, from these decided cases, we can come to the conclusion that a trial begins when the charge is read to the accused person and his plea taken but it only commences at the trial proper when the prosecution calls its first witness.

In the instant case when the trial began it was one Mr. Raisun Abas who prosecuted and not Mr. Lester Daungkil. However, there was no indication on the source of authority of Mr. Raisun when he instituted the criminal proceeding. As such I can only conclude that it must be pursuant to s. 40A of the Enactment. And that would make the institution of the proceeding a nullity in view of my finding on the legal position of the said section in relation to the Constitution.

On the averment that the commencement of the prosecution should be taken as proper even if it was instituted in the way as in this case since the PP could have intervened at any time in the course of the proceeding, with respect such argument ignored one basic fact, namely, that there should be no room for assumption when it comes to interpretation of any provision of the Constitution. More so when the provision is very clear as in this case. In fact it is not so much of the power of the public prosecutor to intervene. I do not think that can be questioned. Rather it is the intended purpose of the impugned section in relation to art. 145(3) of the Constitution, that is, a purported move to empower another authority to institute and conduct criminal prosecution in the face of the clear wordings of the said article. Thus, for that reason I do not think there can be any question of prospective ruling as urged by the learned deputy. I am well aware of the possible inconvenience since there are several pending cases in the lower courts. But that should not be the reason to ignore an obvious provision of the Constitution. To do so would set a precedent whereby convenience would take precedence over the requirement of the law. That should never be allowed in particular in relation to the Constitution. And to that I recall what his Lordship Wan Sulaiman SCJ said on the importance of observing the basic requirement of the law in the case of *Krishnan v. PP* [1987] 1 MLJ 292 at p. 295:

> It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that his guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.

Conclusion

For the reasons hereinabove that I dismissed the appeal of the prosecution against the discharge not amounting to acquittal of the respondents on the charge preferred against them. But I must add here that there is nothing to prevent the prosecution from commencing a fresh charge against the respondents without relying on the provision of s. 40A of the Enactment.